# STATEMENT PRESENTED BY TERRY R. YELLIG ON BEHALF OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO,

# BEFORE THE HOUSE OF REPRESENTATIVES' COMMITTEE ON EDUCATION AND THE WORKFORCE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

# OVERSIGHT HEARING ON "IMMIGRATION: ECONOMIC IMPACT ON AMERICAN WORKERS AND THEIR WAGES"

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MR. CHAIRMAN: My name is Terry Yellig, and I am an attorney with the law firm of Sherman, Dunn, Cohen, Leifer & Yellig, which is located in Washington, D.C. I am appearing today on behalf of the Building and Construction Trades Department, AFL-CIO, the eleven (11) national and international labor unions affiliated with it, and more than three million workers engaged in the building and construction industry in the United States.

I appreciate the opportunity to appear today before this subcommittee because there have been numerous erroneous comments and statements made over the past two months concerning the prevailing wage requirement applicable to the recruitment and employment of foreign guest workers in Title IV of S. 2611, the Comprehensive Immigration Reform Act of 2006, passed by the Senate in May 2006, which I want to address. These comments and statements generally reflect misunderstanding and confusion concerning the intended purpose and effect of the prevailing wage requirement in S. 2611 that requires some clarification and explanation.

The Senate bill creates a new temporary foreign guest worker program called the "H-2C visa program." The bill includes numerous labor protections intended to assure that admission of H-2C guest workers does not adversely affect American workers wages and living standards while at the same time preventing exploitation of the foreign guest workers. S. 2611 prohibits employers from hiring temporary foreign guest workers under the "H-2C visa program" unless they have first tried to recruit American workers for a job vacancy. In attempting to recruit American workers, employers must offer to pay not less than the wage rate they actually pay comparable employees in their

incumbent workforce or the prevailing wage for the occupation, whichever is higher. Then, in the event an employer is unable to recruit a qualified American to fill the job vacancy, the employer must submit an application to the U.S. Department of Labor for a determination and certification. The certification confirms that American workers who are qualified and willing to fill the vacancy are not available, and that employment of a foreign guest worker will not adversely affect the wages and living standards of American workers similarly employed.

The Senate bill contains additional provisions intended to ensure that employers do not hire temporary foreign guest workers to replace American workers who are on lay off, on strike, or locked out of their jobs in the course of a labor dispute. In addition, the Senate bill requires employers to provide the same benefits and working conditions to temporary foreign guest workers that they provide to their American employees in similar jobs. Furthermore, employers would be required under the Senate bill to provide workers compensation insurance to temporary foreign guest workers they hire.

Most of the criticism of the prevailing wage requirement applicable to foreign guest workers under the "H-2C visa program" in S. 2611 is that it entitles them to payment of a higher wage rate than American workers similarly employed. This is a misperception of the prevailing wage requirement in S. 2611 based on a misunderstanding of its purpose and intent.

The perceived impact of foreign workers on our labor market has been a major issue throughout the history of U.S. immigration policy and law, because such workers can present a threat of unfair wage competition. This perception is because foreign workers whose desperation for jobs, low cost of living in their countries of origin, and restricted status in the United States can cause them to accept wages and living standards far below U.S. standards. Thus, Congress enacted the Foran Act in 1885, which made it unlawful under any circumstances to import foreign workers to perform labor or service of any kind in the United States.

This bar on employment-based immigration lasted until 1952, when Congress enacted the Immigration and Nationality Act, which brought together many disparate immigration and citizenship statutes and made significant revisions in the existing laws. The 1952 Act authorized visas for foreigners who would perform needed services because of their high educational attainment, technical training, specialized experience, or exceptional ability. Prior to admission of these employment-based immigrants, however, Section 212 of the 1952 Act required the Secretary of Labor to certify to the Attorney General of the United States and the Secretary of State that there were not sufficient American workers "able, willing and qualified" to perform this work and that the employment of such foreign workers would not "adversely affect the wages and living standards" of similarly employed American workers. Under this procedure, the Secretary of Labor was responsible for making a labor certification. In 1965, Congress substantially changed the labor certification procedure by placing the responsibility on prospective employers of intended immigrants to file labor certification applications with the Secretary of Labor prior to issuance of a visa.

The current statutory authority that conditions admission of employment-based immigrants on labor market tests is set forth in the exclusion portion of the Immigration and Nationality Act, which denies entry to the United States of immigrants and nonimmigrants seeking to work without proper labor certifications. The labor certification ground for exclusion covers both foreigners coming to live as permanent legal residents and as temporarily admitted nonimmigrants. Section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5), states:

> ***Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified*** to the Secretary of State and the Attorney General ***that—(I) there are not sufficient workers who are able, willing, qualified*** (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, ***and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed***.

(Emphasis added.)

For many years beginning in 1967, the Department of Labor's labor certification regulations implementing Section 212(a)(14) (since recodified as § 212(a)(5)) provided that, in order to determine whether prospective employment of both immigrants and nonimmigrants seeking to perform skilled or unskilled labor in the United States will adversely affect "wages" or "working conditions" of American workers, the Secretary of Labor must determine whether such employment will be for wages and fringe benefits no less than those prevailing for American workers similarly employed in the area of intended employment of the foreign worker.

Thus, until March 28, 2005, the Department of Labor's regulations implementing the labor certification requirement in Section 212(a)(5) of the Immigration and Nationality Act provided that, where available, the prevailing wages shall be the rates determined to be prevailing for the occupations and in the localities involved pursuant to the provisions of the Davis-Bacon Act or the McNamara–O'Hara Service Contract Act. *See e.g.*, 32 Fed. Reg. 10932 (July 26, 1967) (codified as 29 C.F.R. § 60.6). These prevailing wage rates were applied to job openings for which employers sought Department of Labor certifications without regard to whether they were otherwise covered by the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act. Consequently, the idea of using prevailing wage rates determined pursuant to the Davis-Bacon Act and the McNamara-O'Hara Service Contract Act is not new or expansionary.

In fact, until the 1990's, the only time the Department of Labor regulations permitted use of a prevailing wage rate other than one issued under the Davis-Bacon

Act or the McNamara-O'Hara Service Contract Act for alien labor certification purposes was when there was no such rate available. *See* 20 C.F.R. § 656.40(a)(2) (2004). In that case, DOL guidelines, which were initially adopted in October 1997 and modified in April 1999, provide that prevailing wage rates for labor certification purposes can be based on wage surveys conducted under the wage component of the Bureau of Labor Statistics' expanded Occupational Employment Statistics ("OES") program or an employer-provided wage survey. DOL's guidelines further provide that alternative sources of wage data can be used where neither the OES survey nor the employer provides wage data upon which a prevailing wage determination can be established for an occupation for which an employer is seeking a labor certification, so long as the data meets the criteria set forth therein regarding the adequacy of employer-provided wage data

On May 6, 2002, however, the Secretary of Labor published proposed changes in the labor certification regulations, which essentially codified DOL's guidelines permitting use of prevailing wage rates based on the wage component of the OES wage survey or employer-provided wage survey data that meets the requirements described in the DOL guidelines. 67 Fed. Reg. 30466 *et seq.*, 30478-79 (May 6, 2002). In addition, the Secretary's proposed regulations eliminated mandatory use of prevailing wages determined pursuant to the Davis-Bacon Act and the McNamara-O'Hara Service Contract Act where otherwise applicable. *Id.* at 30478.

The Secretary of Labor's May 6, 2002 Notice of Proposed Rulemaking explained that she had decided that it is inappropriate to use prevailing wage rates determined pursuant to the Davis-Bacon Act and the McNamara-O'Hara Service Contract Act as the minimum rates that will not adversely affect the wages of American workers similarly employed. The reason offered in the Notice of Proposed Rulemaking for this conclusion was that the procedures used to determine Davis-Bacon Act and McNamara-O'Hara Service Contract Act prevailing wage rates are significantly different from those set forth in DOL's guidelines for determining prevailing wage rates for labor certification purposes in occupations for which a prevailing wage rate under one of these laws is not available. *Id.* at 30479. Hence, the Secretary's reason for eliminating mandatory use of prevailing wage rates determined pursuant to these two federal prevailing wage laws was not that they were less accurate than the wage component of the OES program, but merely because their respective methodology is different. *Id.* Eventually, the Secretary of Labor adopted the changes proposed in the 2002 Notice of Proposed Rulemaking on December 27, 2004, which became effective on March 28, 2005. 69 Fed. Reg. 77326 *et seq.*, 77365-66 (December 27, 2004).

Notwithstanding, the Republican Policy Committee's July 11, 2006 report and many others have argued recently that audits of the Davis-Bacon wage survey process demonstrate that it is less accurate than the wage component of the OES program. It is doubtful, however, that the OES program or any other wage survey process could withstand the kind of scrutiny applied to the Davis-Bacon wage survey process. After all, both the OES program and the Davis-Bacon wage survey program depend entirely on the voluntary participation of employers to submit wage data, and the Davis-Bacon

wage survey process now includes a nationwide employer payroll-auditing component, which better assures the accuracy of the wage data submitted by participating employers. The OES program does not include an auditing component.

In any event, this recitation demonstrates that use of prevailing wage rates determined pursuant to the Davis-Bacon Act and the McNamara-O'Hara Service Contract Act as minimum wage rates that will not adversely affect the wages of American workers similarly employed is not a concept introduced for the first time in S. 2611. On the contrary, use of prevailing wage rates determined pursuant to the Davis-Bacon Act and the McNamara-O'Hara Service Contract Act as the minimum rates that will not adversely affect the wages of American workers similarly employed was integrally intertwined for nearly 40 years in the labor certification process. Use of prevailing wage rates based on these federal prevailing wage laws was regarded as best serving the intended purpose of the labor certification process, which is to protect American workers from unfair wage competition by foreign workers seeking permanent and temporary employment opportunities in the United States.

It was always understood that, in rare instances, this process might result in payment of higher wages to newly hired foreign workers than to an employer's incumbent workforce. The possibility that mandatory use of prevailing wage rates determined pursuant to the Davis-Bacon Act and the McNamara-O'Hara Service Contract Act might create such a wage disparity is minimal inasmuch as it is highly unlikely that an employer will opt to hire a foreign worker if it upsets the employer's wage structure, unless the employer truly has no other choice. In that case, the employer is more likely than not to raise the incumbent workforce's wage rate. In any event, this dynamic provides the greatest assurance that employers cannot take advantage of a pool of foreign workers willing to accept employment at a depressed wage rate because they are desperate for jobs, come from countries that have low costs of living, and have restricted status in the United States.

In addition, Congress recently enacted the Consolidated Appropriations Act of 2005 that added Section 212(p)(4) to the Immigration and Nationality Act, 8 U.S.C. § 1182(p)(4), which provides:

> Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.

The Secretary of Labor's recent adoption of new regulations that eliminated mandatory use of prevailing wage rates determined pursuant to the Davis-Bacon Act and the McNamara-O'Hara Service Contract Act, coupled with enactment of Section

212(p)(4) of the Immigration and Nationality Act, has undoubtedly reduced the prevailing wage rates used in the foreign worker labor certification process. These actions have adversely affected the wages of American workers similarly employed, because the minimum wages employers are now required to pay foreign workers issued permanent and temporary employment-related visas are more likely to be lower. This is exactly the opposite effect intended by Congress when it incorporated the labor certification process in the Immigration and Nationality Act in 1952 and amended it in 1965.

It was precisely because of these regulatory changes that the Senate decided to codify the prevailing wage provision applicable to the new "H-2C guest worker visa program" created by S. 2611, so that American workers' wages will not be further adversely effected. Thus, contrary to the assertions of some, use of prevailing wage rates determined pursuant to the Davis-Bacon Act and the McNamara-O'Hara Service Contract Act as the minimum wage rates that will not adversely affect the wages of American workers similarly employed is harmonious with the intended purpose and intent of the labor certification process that has been consistently applied to applicants for employment-based permanent and temporary visas seeking to perform skilled and unskilled labor since 1952. As such, codification of the prevailing wage requirement in the new "H-2C guest worker visa program" created by Title IV of S. 2611 in no way represents an expansion of the Davis-Bacon Act, nor will it provide greater wage protection to foreign guest workers than to American workers similarly employed.